MOTION FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

MOTION FOR LEAVE TO FILE AMENDED ANSWER SETTING FORTH COUNTERCLAIM AND AMENDED ANSWER AND COUNTERCLAIM

Robert F. List
Attorney General of Nevada

James H. Thompson
Chief Deputy Attorney General

Michael W. Dyer
Deputy Attorney General

Harry W. Swainston
Deputy Attorney General

Capitol Complex
Carson City, Nevada 89710
Telephone: (702) 885-4170

Counsel for Defendant,
State of Nevada

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

MOTION FOR LEAVE TO FILE AMENDED ANSWER SETTING FORTH COUNTERCLAIM AND AMENDING PREVIOUS ANSWER

COMES NOW the defendant State of Nevada and moves the Court for an

Order granting leave to file an Amended Answer amending defendant State's previous Answer and setting forth counterclaim. This motion is based upon the following grounds:

1. The counterclaim sought to be asserted is compulsory in nature as it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim. Federal Rules of Civil Procedure, Rule 13(a).

2. The counterclaim is based upon facts unknown at the time of defendant's answer and was therefore omitted. Justice requires the omitted counterclaim be allowed to be raised by amendment. Federal Rules of Civil Procedure, Rule 13(f).

3. The counterclaim must be raised in this proceeding or not at all under principles of res judicata.

4. The interests of justice require that the facts and the law relative to the entire boundary between Nevada and California be fully adjudicated in this proceeding. Federal Rules of Civil Procedure, Rule 1.

5. Facts discovered during the pendency of this proceeding compel the State of Nevada to seek to amend the Answer to set forth her present position relative to allegations of the Complaint.

This motion is further based upon all of the pleadings, papers and records filed to date in this proceeding and upon the annexed memorandum of points and authorities and the annexed proposed amended answer and counterclaim.

Respectfully submitted,

ROBERT LIST
Attorney General of the
State of Nevada
JAMES H. THOMPSON
Chief Deputy Attorney
General
MICHAEL W. DYER
Deputy Attorney General
HARRY W. SWAINSTON
Deputy Attorney General

By James H. Thompson
James H. Thompson
Chief Deputy Attorney
General

CERTIFICATE OF SERVICE

I, JAMES H. THOMPSON, Chief Deputy Attorney General of Nevada, hereby certify that on the 21st day of April, 1978, I mailed by first class mail, postage prepaid, three copies to each of the following:

Edmund G. Brown, Jr.
Governor of California
State Capitol Building
Sacramento, California 95814

Evelle J. Younger
Attorney General of California
555 Capitol Mall, Suite 550
Sacramento, California 95814

James H. Thompson
Chief Deputy Attorney General

IN THE SUPREME COURT OF THE

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OCTOBER TERM, 1976

NO. 73, Original

STATE OF CALIFORNIA,

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STATE OF NEVADA

Defendant.

MEMORANDUM OF

POINTS AND AUTHORITIES

I. THE COUNTERCLAIM SOUGHT TO BE ASSERTED IS COMPULSORY

Federal Rules of Civil Procedure, Rule 13(a) provides in pertinent part:

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . ."

A claim which arises out of the transaction

or occurrence that is the subject matter of the opposing party's claim must be pleaded or it is barred. This Court construed the compulsory counterclaim provision of Equity Rule 30 which required a counterclaim "arising out of the transaction which is the subject matter of the suit" in Moore v. New York Cotton Exchange, 270 U.S. 593, 610 (1926). There the Court recognized that:

> "'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."

In Moore, one of the links in the chain which constituted the basis of the plaintiff's cause of action was the refusal of the defendant to furnish quotations. It was also an important part of the transaction constituting the subject matter of the counterclaim and therefore the Court held that the counterclaim was compulsory.

In this proceeding Nevada's counterclaim arises out of essentially the same facts which the State of California relies upon as the basis of her complaint. "That they are not precisely identical, or that the counterclaim embraces additional allegations . . . does not matter." Id.

Rule 13(a) is broader in scope than Equity Rule 30 as it is stated in terms of "transactions or occurrences" rather than transactions only. Professor Moore in 3 Moore's Federal Practice ¶13.13

opines that the "courts should give the phrase 'transaction or occurrence that is the subject matter' of the suit a broad realistic interpretation in the interest of avoiding a multiplicity of suits." See Southern Construction Company v. Pickard, 371 U.S. 57, 60 (1962).

The State of Nevada's counterclaim arises out of transactions and occurrences which are logically related to those claims that the State of California has asserted in that it involves the operative facts surrounding the several surveys.

II. JUSTICE REQUIRES THAT THE COUNTERCLAIM SOUGHT TO BE ASSERTED BE RAISED BY AMENDMENT OF ANSWER

Federal Rules of Civil Procedure, Rule 13(b) provides:

> "OMITTED COUNTERCLAIM. When a pleader fails to set up a counterclaim through inadvertance, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment."

The State of Nevada omitted the counterclaim because she was unaware of the existence of certain facts at the time of the Answer. The border controversy raised by California's Complaint involves complex historical facts which counsel for Nevada was able to determine only through extensive, in depth research. Justice requires that the State of Nevada be permitted to assert the omitted counterclaim based upon the

product of such research. The interjection of the counterclaim will not upset in any manner the orderly presentation of issues already before the Court.

Professor Moore suggests at 3 Moore's Federal Practice ¶13.33 that "inasmuch as a party could later be met successfully with a plea of res judicata in a suit on a claim within subdivision (a) which he had failed to plead, the courts should be very liberal in allowing amendments to include compulsory counterclaims..."

III. THE COUNTERCLAIM MUST BE RAISED IN THIS PROCEEDING OR NOT AT ALL UNDER PRINCIPLES OF RES JUDICATA

The basic elements of res judicata are a court of competent jurisdiction; final prior judgment on the merits; same parties or privies; and same cause of action. Blonder Tongue Lab. Inc. v. University of Ill. Foundation, 402 U.S. 313, 323-24, (1971); Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948); Cromwell v. County of Sac., 94 U.S. 351, 352 (1877).

In any future litigation between California and Nevada relative to their common boundary the only possibility that the lawsuit would not be barred by the doctrine of res judicata is that the cause of action involved in the subsequent litigation might be deemed different so as not to be barred by the judgment in this proceeding. Broad construction by the courts of "cause of action" renders this possibility unlikely, however.

A widely used test for comparing causes of action is whether the primary right and duty, and the delict or wrong, are the same in each action or, to put it another way, whether the same right has been infringed by the same wrong. Baltimore S.A. Co. v. Phillips, 274 U.S. 316, 321 (1927); Seaboard Coastline Railroad Co. v. Gulf Oil Corp., 409 F.2d 879, 881 (5th Cir. 1969); Englehardt v. Bell & Howell Company, 327 F.2d 30, 32 (8th Cir. 1964). In the instant case the primary right is dominion and sovereignty over each State's territory. The correlative duty is the obligation of the other State to respect such dominion and sovereignty. The delict is the wrongful assertion by one State of dominion and sovereignty over lands of the other. A subsequent cause of action involving the common boundary would necessarily involve the same primary right, duty and delict or wrong.

This Court stated in Baltimore S.S. v. Phillips, supra, at 321:

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show."

A judgment's finality applies to facts which might have been pleaded with reference to the same events as well as to those actually pleaded and which became final by adjudication. Lester v. National Broadcasting Company, Inc., 217 F.2d 399, 400 (9th Cir. 1955), cert. denied 348 U.S. 954 (1955).

The right which each State seeks to establish by this proceeding is the proper location of the common boundary

between them. The State of Nevada has recently discovered historical facts which are not only relevant to issues concerning boundary lines heretofore presented but support other boundary lines which the State wishes to assert. The State submits that the right to a settled boundary is a single cause of action within which all relevant facts must be pleaded to support whatever grounds for relief there may be.

This original proceeding is in the nature of a quiet title action. Furthermore, the claims sought to be raised by the State of Nevada in her counterclaim involve territory that is adjoining the territory which is the subject matter of the State of California's claims. It seems appropriate, therefore, that all property which may be in the zone of dispute be drawn into this proceeding so as to conclusively quiet title to all border lands in controversy.

Mr. Justice Holmes stated in United States v. California and Oregon Land Co., 192 U.S. 355, 358 (1904):

> "But the whole tendency of our decision is to require the plaintiff to try his whole cause of action and his whole case at one time."

In that case this Court looked to the intent of a previous quiet title suit brought by the United States and determined that its purpose was to conclusively quiet title or otherwise terminate the claims to the land in question. "All claimants of any interest were at liberty to intervene and to have any other question affecting

the title settled..." 192 U.S. at 359. Thus, the Court recognized that defendants as well as plaintiffs are barred by the same principle.

In Northern Pacific Railway Company v. Slaght, 205 U.S. 122, 131-132 (1907), this Court recognized that:

> "Although there may be several different claims for the same thing, there can only be one right of property in it; therefore, when a cause of action has resulted in favor of the defendant, when the plaintiff claims the property of a certain thing there can be no other action maintained against the same party for the same property, for that would be to renew the question already decided; for the single question in litigation was whether the property belonged to the plaintiff or not; and it is of no importance that the plaintiff failed to set up all of his rights upon which his cause of action could have been maintained; it is sufficient that it might have been litigated.
>
> ****
>
> "The doctrine has illustrations in suits to quiet title. It was decided in Lessees Of Parrish v. Ferris, et al., 2 Black, 606, that the judgment in an action to quiet title is conclusive of the title, whether adverse to the plaintiff in the action or to the defendant. In other words it determines the merits of the plaintiff's title as well as that

of the defendant."

The res in this proceeding is the territory which lies on the common boundary of the States of Nevada and California and contiguous to each. It belongs to either one State or the other. The purpose of the counterclaim which the State of Nevada is attempting to assert is to present for adjudication the common boundary issues for all time.

A party is required to try his whole cause of action and his whole case at one time; he cannot split up his claim and he cannot divide the grounds for his recovery. See United States v. California & Oregon Land Co., supra at 358; see also Baltimore S.S. Co. v. Phillips, supra; Northern Pacific R.R. Co. v. Slaght, supra; Cromwell v. County of Sac., supra, at 358; Hatchitt v. United States, 158 F.2d 754, 755 (9th Cir. 1946); McCarthy v. Noren, 370 F.2d 845, 847 (9th Cir. 1966); F. L. Mendez & Co. v. General Motors Co., 161 F.2d 695, 698 (7th Cir. 1947), cert. denied, 332 U.S. 810 (1947). All of these cases conclude that the second suit is barred by res judicata when it is based upon a demand that a party could have pleaded and litigated in a prior action.

The courts, in invoking res judicata, have repeatedly emphasized that the doctrine applies not only in respect to every matter which was actually pleaded or litigated in the prior action, but also as to every matter which could have been presented in the prior action. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 375, 378 (1940); Baltimore S. S. Co. v. Phillips, supra; Boys Town U.S.A. v. World Church, 349 F.2d 576, 578

(9th Cir. 1965), cert. denied, 383 U.S. 910 (1966); Hatchitt v. United States, supra; Rhodes v. Jones, 351 F.2d 884, 886-887 (8th Cir. 1965), cert. denied, 383 U.S. 919 (1966). Since the judgment in the present case will have the effect of extinguishing the cause of action, it will be conclusive in any later suit, not only on those matters which actually were litigated, but on all matters which could have been litigated in this proceeding. Harrison v. Bloomfield Bldg. Indus., 435 F.2d 1192 (6th Cir. 1970).

This Court noted in Blonder Tongue Lab., Inc. v. University of Ill. Foundation, supra, at 328 that:

> "[M]ore than crowded dockets is involved. The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue."

The policy of the Federal Rules of Civil Procedure to encourage joinder of claims and counterclaims and which emphasizes the economics of sound judicial administration by cutting down multiplicity of suits fully support the State of Nevada's motion to amend her answer setting forth whatever counterclaims she has with respect to issues relating to her common border with California.

IV. THE INTERESTS OF JUSTICE SUPPORT NEVADA'S MOTION TO AMEND HER ANSWER

Federal Rule of Civil Procedure, Rule 15(a) provides that where a responsive

pleading has been served:

> "[A] party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

The State of Nevada seeks to amend her answer to make more definite certain admissions and denials of allegations contained in California's Complaint based upon newly discovered facts.

In Forman v. Davis, 371 U.S. 178, 182 (1962) this Court reaffirmed its position that "the purpose of pleading is to facilitate a proper decision on the merits." In this respect the Court noted that:

> "The Rules themselves provide that they are to be construed 'to secure the just, speedy and inexpensive determination of every action.' Rule 1."

This Court further noted at 182 that:

> "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded."

In addition to the inclusion of a compulsory counterclaim, Nevada's efforts to amend are asserted in a good faith effort to admit those facts which it now believes to be true. Nevada submits that leave to amend in such manner should be "freely given".

Respectfully submitted,

ROBERT LIST, Attorney
General of Nevada
JAMES H. THOMPSON, Chief
Deputy Attorney General
MICHAEL W. DYER
Deputy Attorney General
HARRY W. SWAINSTON
Deputy Attorney General

By James H. Thompson
James H. Thompson
Chief Deputy Attorney
General

Capitol Complex
Carson City, Nevada 89710

Telephone: (702) 885-4170

Counsel for Defendant
State of Nevada

IN THE SUPREME COURT OF THE

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STATE OF CALIFORNIA,

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Defendant.

AMENDED ANSWER AND COUNTERCLAIM

COMES NOW, the State of Nevada by and through her Attorney General, Robert List, and answers the complaint of the State of California in this original proceeding as follows:

I.

The State of Nevada admits Pararaph I of the complaint.

II.

In answer to Paragraph II of the complaint, the State of Nevada admits that the description of the boundary of the State of California was described in 1849 as set forth in the complaint. However, the

State of Nevada denies that the description of the boundary of the State of California is presently described as set forth in Paragraph II of the complaint. The State of Nevada further denies that Exhibit 1 is an accurate representation of the placement of the boundary described in Paragraph II of the complaint and demands strict proof thereof.

III.

In answer to Paragraph III of the complaint, the State of Nevada admits that she was admitted to this Union of United States by Act of Congress and Presidential Proclamation as stated in Paragraph III of the complaint. The State of Nevada further admits that the language of Article Fourteen, Section 1 of the Nevada Constitution which is quoted in Paragraph III of the complaint is contained in said Article Fourteen, Section 1 of the Nevada Constitution. However, the State of Nevada denies that the language quoted in Paragraph III of the complaint is complete and alleges that the entire description of Nevada's boundaries is as follows:

> The boundary of the State of Nevada shall be as follows: Commencing at a point formed by the intersection of the thirty eighth degree of Longitude West from Washington with the Thirty Seventh degree of North latitude; Thence due West along said thirty seventh

degree of North latitude to the eastern boundary line of the State of California; thence in a North Westerly direction along said Eastern boundary line of the State of California to the forty third degree of Longitude West from Washington; Thence North along said forty third degree of West Longitude, and said Eastern boundary line of the State of California to the forty second degree of North Latitude; Thence due East along the said forty second degree of North Latitude to a point formed by its intersection with the aforesaid thirty eighth degree of Longitude west from Washington; Thence due South down said thirty eighth degree of West Longitude to the place of beginning. And whensoever Congress shall authorize the addition to the Territory or State of Nevada of any portion of the territory on the Easterly border of the foregoing defined limits, not exceeding in extent one degree of Longitude, the same shall thereupon be embraced within, and become a part of this State. And furthermore Provided, that all such territory, lying West of and adjoining the boundary line

> herein prescribed, which the State of California may relinquish to the Territory or State of Nevada, shall thereupon be embraced within and constitute a part of this State. Nevada Constitution, Article Fourteen, Section 1.

IV.

The State of Nevada admits all portions of Paragraph IV of the complaint.

V.

The State of Nevada admits all portions of Paragraph V of the Complaint and alleges that the People of California as recently as November 7, 1972, adopted the 1863 "Houghton-Ives" boundary line by amending their constitution fixing California's boundary to be as described in the 1849 Constitution except "as modified pursuant to statute."

VI.

In answer to Paragraph VI of the complaint, the State of Nevada admits that the "Houghton-Ives" line was adopted by the legislature of the State of Nevada in 1865 as the legal western boundary of Nevada, notwithstanding the fact that Nevada's Constitution described her western boundary along the 43rd Meridian West of Washington. The correct citation of such adoption is

Statutes of Nevada 1864-1865, Ch. 31, pp. 133-134, 379. The State of Nevada admits that said line was observed by the State of Nevada from 1865 to 1872.

VII.

In answer to Paragraph VII of the complaint, the State of Nevada admits that in 1872 the United States Government through its General Land Office entered into a contract with Allexey W. Von Schmidt. The State of Nevada admits that the purpose of the contract between the United States and Allexey W. Von Schmidt was to survey, post and monument the One Hundred Twentieth Meridian between the Forty Second and Thirty Ninth degrees of North latitude. The State of Nevada alleges that the survey was to begin at the point of intersection of the Forty Second degree of North latitude with the One Hundred Twentieth Meridian as established by U. S. Surveyor and Astronomer Daniel G. Major in 1868, and proceed on a true meridian south to the intersection of the Thirty Ninth degree of North latitude with the One Hundred Twentieth Meridian. The State of Nevada admits that a line known as the "Von Schmidt" line was surveyed, posted and monumented, and admits that the "Von Schmidt" line varies in location from the "Houghton-Ives" line. However, the State of Nevada denies that the variation is from 3000 to 6000 feet as alleged in Paragraph VII of the complaint for lack of information and

belief and demands strict proof thereof. The State of Nevada admits that since 1873 both states have exercised and continue to exercise political jurisdiction and sovereignty up to the "Von Schmidt" line as presently marked on the ground. The State of Nevada denies that the "Von Schmidt" line constitutes the lawful boundary between the states by acquiescence.

VIII.

In answer to Paragraph VIII of the complaint, the State of Nevada admits that a controversy exists between the States of California and Nevada as alleged in Paragraph VIII of the complaint. However, the State of Nevada lacks sufficient information and belief to form an answer as to the exact width of the area in dispute and therefore denies that said area is approximately 3000 feet wide at the north end of Lake Tahoe and increases to 6000 feet wide and demands strict proof thereof. The State of Nevada specifically denies that the area between the 1863 Houghton-Ives line and the 1872 Von Schmidt line is the only area in dispute. The areas in dispute as they relate to the Lake Tahoe area are shown on Exhibits "A" and "B" attached to this Amended Answer.

IX.

In answer to Paragraph IX of the complaint, the State of Nevada

admits that the State of California has exercised jurisdiction to the "Von Schmidt" line as presently marked on the ground since 1873. The State of Nevada denies that the State of California has now or in the past obtained dominion in the lands in question. The State of Nevada further denies she has acquiesced in California's exercise of sovereignty and jurisdiction or that California has obtained title to the land in question.

X.

The State of Nevada admits that the "Von Schmidt" line has, from time to time since 1872, been questioned in the reports of governmental agencies and that such reports have caused uncertainty and the recurring possibility of challenges to the lawfulness of such boundary line. The State of Nevada admits that Exhibit 2 does show some lines which are in contention, but shows others which are not in contention. Additionally, other lines are in contention which are not depicted. The State of Nevada admits that neither State has demanded a resurvey of the "Von Schmidt" line north of its intersection with the Thirty Ninth degree of North Latitude.

XI.

The State of Nevada does not construe Paragraph XI of the complaint

as requiring an answer. However, to the extent that an answer should be required, the State of Nevada denies the allegations set forth in Paragraph XI and demands strict proof thereof.

COUNTERCLAIM

COMES NOW the defendant State of Nevada and pursuant to Federal Rule of Civil Procedure 13(a), and counterclaims against the plaintiff State of California as follows:

COUNT I

CLAIM FOR HOUGHTON-B. IVES BOUNDARY

I.

The boundary line between the States of Nevada and California was established by a survey conducted pursuant to agreement of the State of California and the Territory of Nevada in 1863. Said survey was conducted by California Surveyor General J. F. Houghton and Butler Ives, the Boundary Commissioner appointed by the Territory of Nevada. The "Houghton-B. Ives" line was adopted by the California Legislature in 1864 as the Eastern boundary line of the State of California (Cal. Stats. 1864, Chap. 455, pp. 506-507, reenacted as California Government Code Section 160 in 1943 Cal. Stats. 1943, Chap. 134, p. 896). The Legislature of the State

of Nevada adopted the "Houghton-B. Ives" line as the legal Western boundary line of the State of Nevada in 1865. Statutes of Nevada 1864-1865, Chap. 31, pp. 133-134, 379.

II.

The "Houghton-B. Ives" line was surveyed pursuant to agreement of the Territory of Nevada and the State of California to set the boundary line on the One Hundred Twentieth Meridian between the Forty Second degree of North Latitude and the Thirty Ninth degree of North Latitude and southeasterly on a line between the intersection of the One Hundred Twentieth Meridian and the Thirty Ninth degree of North Latitude to the point established by Lieutenant J. C. Ives, Astronomer of the United States Boundary Commission, as the intersection of the Thirty Fifth degree of North Latitude with the Colorado River.

III.

The "Houghton-B. Ives" line was surveyed and monumented between its intersection with the Thirty Ninth degree of North Latitude and its intersection with the Forty Second degree of North Latitude and for approximately one hundred miles Southeasterly on a line directed from the point of intersection with the Thirty Ninth degree of North Latitude to the intersection of the Thirty Fifth degree of North Latitude with the Colorado River as that point was established in 1861 by Lieutenant J. C. Ives, Astronomer of the United States Boundary Commission, pursuant to Act

of Congress of May 26, 1860. (See Exhibit C)

IV.

One hundred years later, in 1961, Congress gave its consent, 75 Stat. 93, to a Compact between Arizona and Nevada defining a portion of the common boundary on the Colorado River beginning at the point where the Nevada-California state line intersects the Thirty Fifth degree of North Latitude. The Arizona-Nevada boundary compact established the point of said intersection with the Thirty Fifth degree North Latitude at the Colorado River. In 1966 Congress gave its consent, 80 Stat. 340, to a Compact between Arizona and California defining their common boundary from the intersection of the boundary line common to California-Nevada and the center line of the channel in the Colorado River as constructed by the U. S. Bureau of Reclamation. The compact expressly recognizes the said point of intersection of the Thirty Fifth degree North Latitude with the Colorado River channel as being common to the boundaries of Arizona, California and Nevada. Thus, the point of intersection of the Thirty Fifth degree of North Latitude with the Colorado River was conclusively established as being the terminal point of the oblique boundary to which the Houghton-B. Ives boundary should be extended.

V.

Under the 1872 contract with the United States alleged in Paragraph VII of the Answer, Allexey W. Von Schmidt conducted

a survey of the eastern boundary of California between its intersection with the Forty Second and Thirty Ninth degrees of North Latitude and from the point of intersection of the One Hundred Twentieth Meridian and the Thirty Ninth Degree of North Latitude on a Southeasterly line to the intersection of the Thirty Fifth degree of North Latitude and the Colorado River. In conducting said survey Allexey W. Von Schmidt, who was acting as an agent of the United States Government, physically moved the boundary between the State of California and the State of Nevada Easterly along its entire length. (See Exhibit D)

VI.

The authorization by Congress of the Von Schmidt survey was in excess of the powers granted to Congress by Article One, Section 8 of the United States Constitution and therefore in violation of the Tenth Amendment to the United States Constitution in that the United States Government purported to take from the State of Nevada and add to the State of California in excess of six hundred square miles. The "Von Schmidt" survey is thus an unconstitutional survey and a nullity from its inception.

VII.

The action of the United States Government by and through its agent Allexey W. Von Schmidt in physically moving the boundary of the State of Nevada without the prior and express consent of the State of Nevada was in violation of Article Four,

Section 3 of the United States Constitution and is therefore unconstitutional.

COUNT II.

ALTERNATIVE CLAIM FOR BOUNDARY FROM MAJOR'S CORNER TO THE COLORADO RIVER

VIII.

The Counterclaimant State of Nevada alleges and incorporates Count I of the Counterclaim as though the same was fully set forth herein.

IX.

Alternatively, if the "Houghton-B. Ives" line did not establish the boundary between Nevada and California, then the boundary between Nevada and California was conclusively established when the North-eastern corner of California was set and monumented in 1868 by Daniel G. Major, U. S. Surveyor and Astronomer, under contract with the United States Government, pursuant to the Act of Congress of March 2, 1867, 14 Stat. 465, at the intersection of the One Hundred Twentieth Meridian with the Forty Second degree of North Latitude. The monument set by Major is standing intact at the present date.

X.

Upon Major's monumenting the Northeast corner of California, which is

the beginning point of California's constitutional boundary, the landmass of the States of California and Nevada with respect to their common boundary was defined and could be connected on the ground by following the description contained in the Constitution of the State of California. That is, by proceeding due South on a true meridian from the corner established by Daniel G. Major; determining where said true meridian South intersected with the Thirty Ninth degree of North Latitude; and at such point taking a line southeasterly to the point established by Lieutenant J. C. Ives at the intersection of the Thirty Fifth degree of North Latitude in the Colorado River. (See Exhibit D)

XI.

The common border of California with Nevada having thus been fixed with the establishment of Major's corner, the action of the United States Government, through its agent Allexey W. Von Schmidt, in physically moving the Northeast corner of the State of California (being also the Northwest corner of the State of Nevada) to the East and then running and monumenting the entire boundary of California and Nevada on the basis of the "new" Northeast corner of California, thereby moving the entire boundary eastward, was violative of Article Four, Section 3 of the United States Constitution and the Tenth Amendment to the United States Constitution in that by such action the United States purported to take territory of the State of Nevada and attach the same to the State of California. (See Exhibit E)

COUNT III

ALTERNATIVE CLAIM FOR THE "VON SCHMIDT" BOUNDARY IN ITS ENTIRETY

XII

Counterclaimant State of Nevada alleges and incorporates Counts I and II of the counterclaim as though the same were fully set forth herein.

XIII.

Alternatively, if neither the "Houghton-B. Ives" boundary nor the boundary established by the corner set by Daniel G. Major in 1868 constitute the boundary between the States of California and Nevada, then the boundary was first established by Allexey W. Von Schmidt in 1872-1874.

XIV.

During the period 1893-1899, the United States Government, at the request of the representatives of the State of California and following correspondence with the Governor of California, undertook a resurvey of and then physically moved the oblique portion of the "Von Schmidt" line. Said action was taken without the prior and express consent of the State of Nevada. (See Exhibit F)

XV.

The action of the United States Government in physically moving the

"oblique boundary" of Nevada and California was in violation of Article Four, Section 3 of the United States Constitution and the Tenth Amendment thereto, in that the United States Government purported to take territory of Nevada and attach the same to California.

WHEREFORE, COUNTERCLAIMANT STATE OF NEVADA PRAYS AS FOLLOWS:

1. That the boundary between the State of Nevada and the State of California be declared to be the 1863 "Houghton-B. Ives" line from its intersection with the Forty Second degree of North Latitude to the intersection with the Thirty Ninth degree of North Latitude; thence along the line marked on the ground by the "Houghton-B. Ives" survey in 1863 to the terminal point thereof; thence continuing on a line to the point established by the 1961 -1966 Compacts as the intersection of the Thirty Fifth degree of North Latitude with the Colorado River.

2. If the Court should determine that the 1863 "Houghton-B. Ives" line is not the legal boundary, that the boundary between the State of Nevada and the State of California be declared to be a line established by running a true Meridian South from the Northeast corner of the State of California as established by Daniel G. Major in 1868 to said true Meridian's intersection with the Thirty Ninth degree of North Latitude and thence on a line to the point established by the 1961 - 66 Compacts as the intersection of the Thirty Fifth degree of North Latitude in the Colorado River.

3. If neither of the two lines prayed for above be determined to be the legal boundary, that the boundary between the State of Nevada and the State of California be held to be the entire "Von Schmidt" line from its beginning at the Forty Second degree of north latitude to its termination at the Colorado River; thence extending easterly to the point established by the 1961 - 66 Compacts as the intersection of the Thirty Fifth degree of North Latitude with the Colorado River.

4. For costs incurred by defendant and counterclaimant herein; and

5. For such other and further relief as the Court may deem proper.

Dated this 21st day of April, 1978.

ROBERT LIST
Attorney General of the
State of Nevada
JAMES H. THOMPSON
Chief Deputy Attorney
General
MICHAEL W. DYER
Deputy Attorney General
HARRY W. SWAINSTON
Deputy Attorney General

By James H. Thompson
James H. Thompson
Chief Deputy Attorney
General

Capitol Complex
Carson City, Nevada 89710

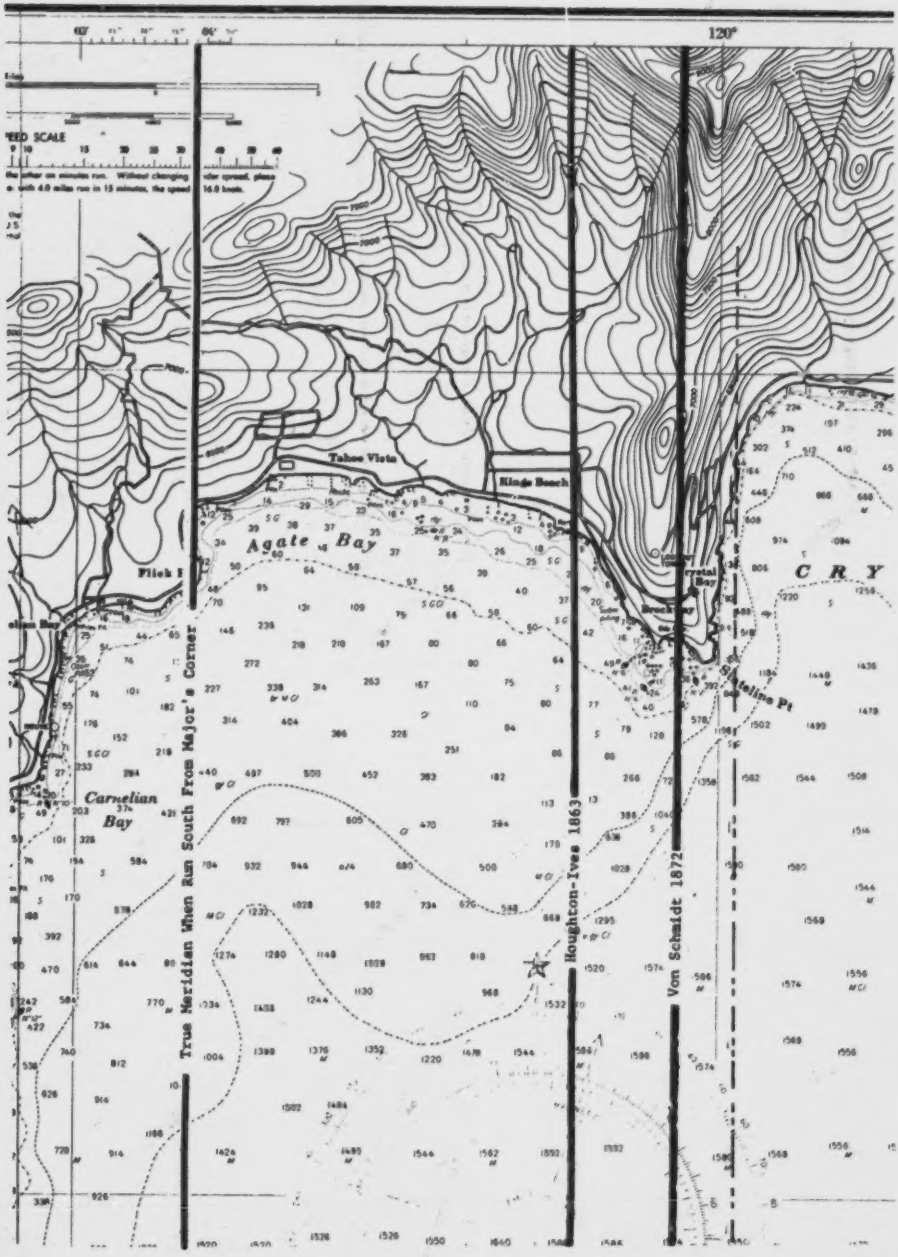

EXHIBIT "A" TO ANSWER

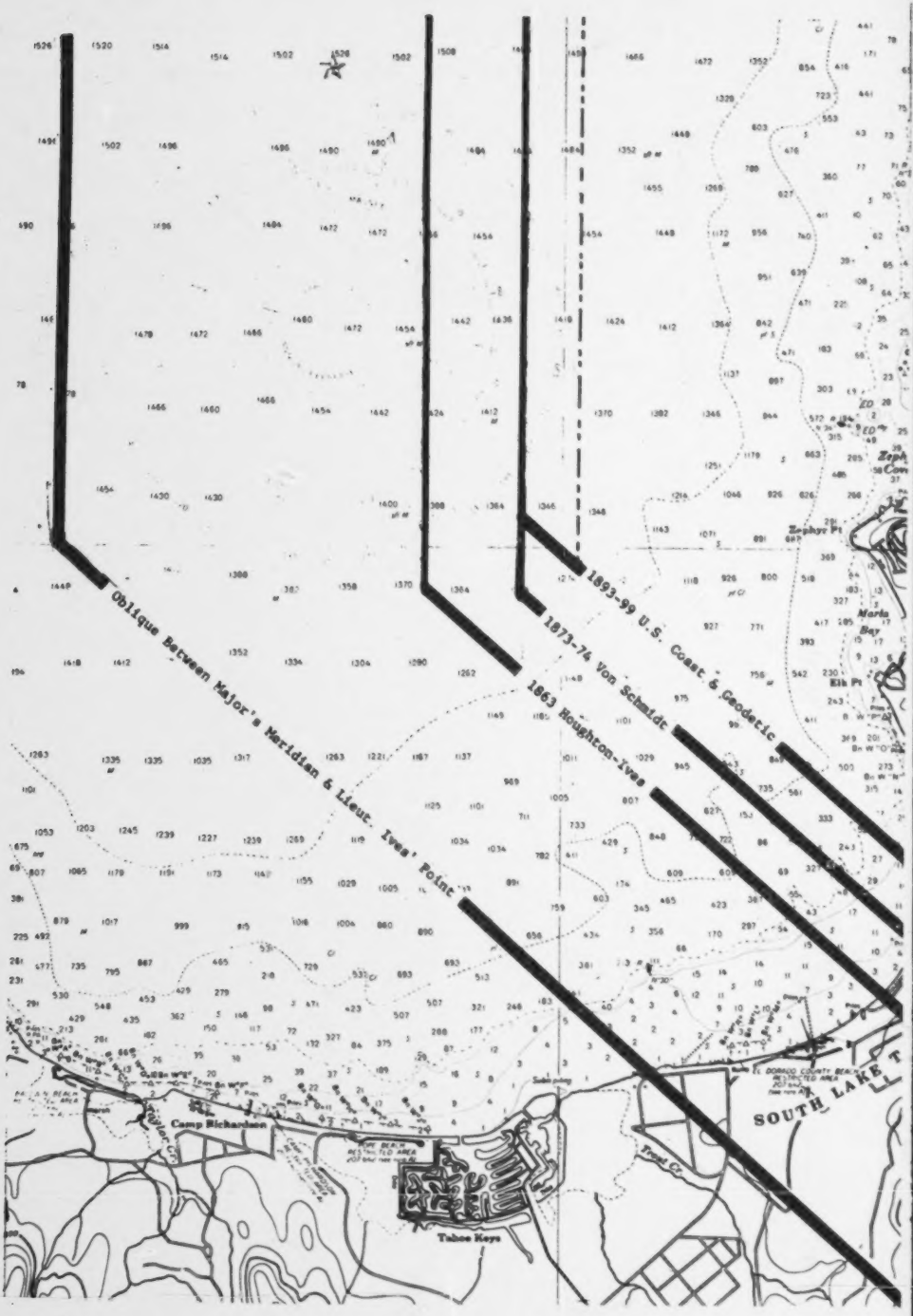

EXHIBIT "B" TO ANSWER

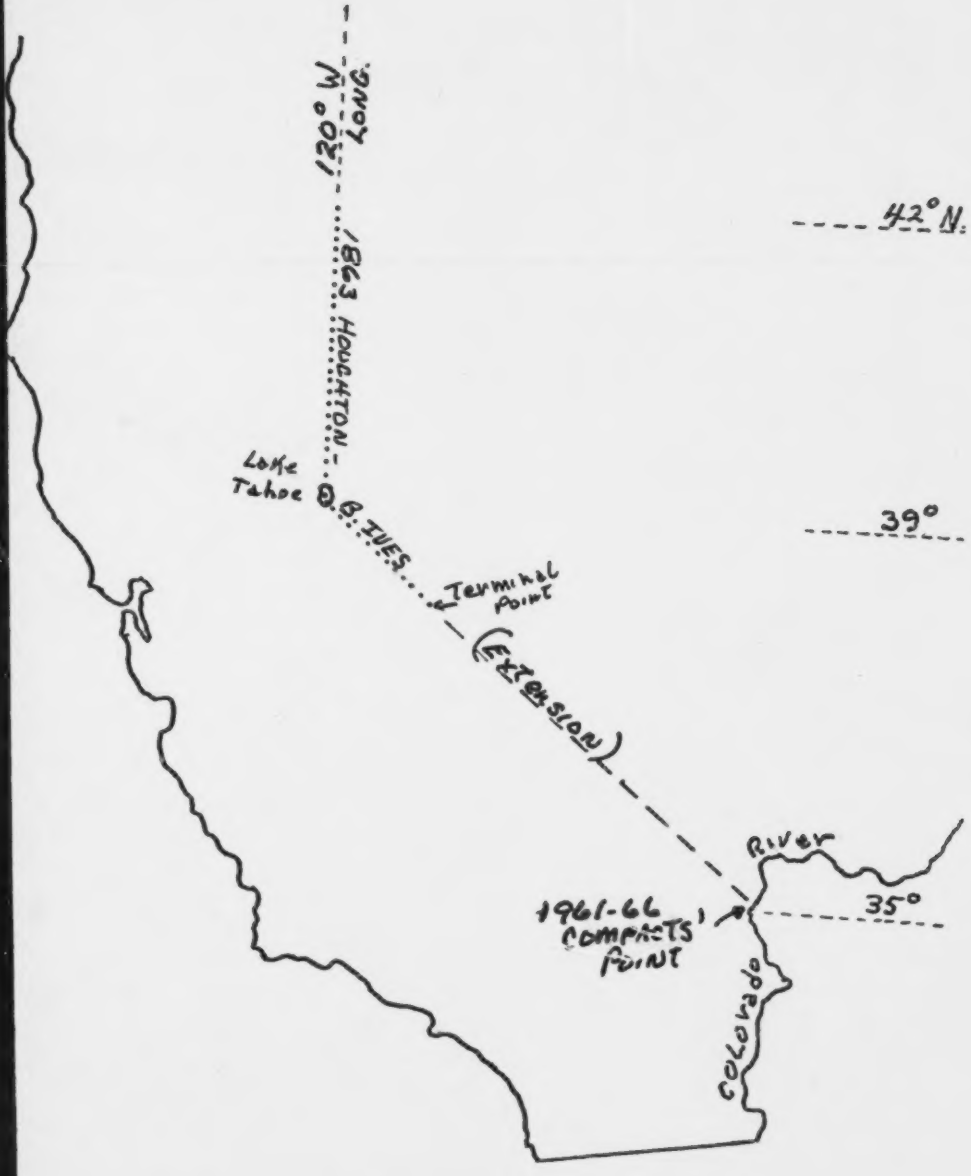

EXHIBIT "C" TO COUNTERCLAIM

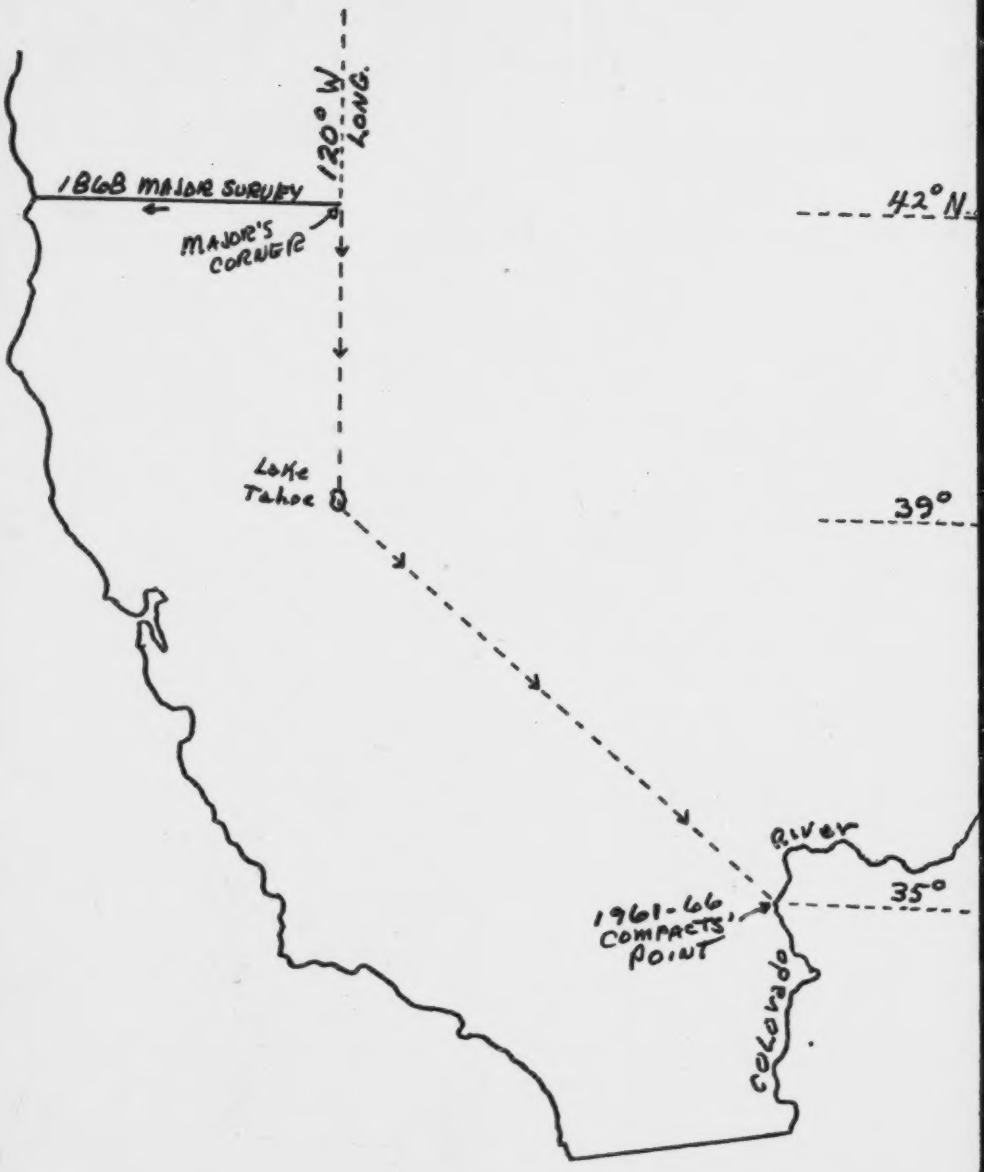

EXHIBIT "D" TO COUNTERCLAIM

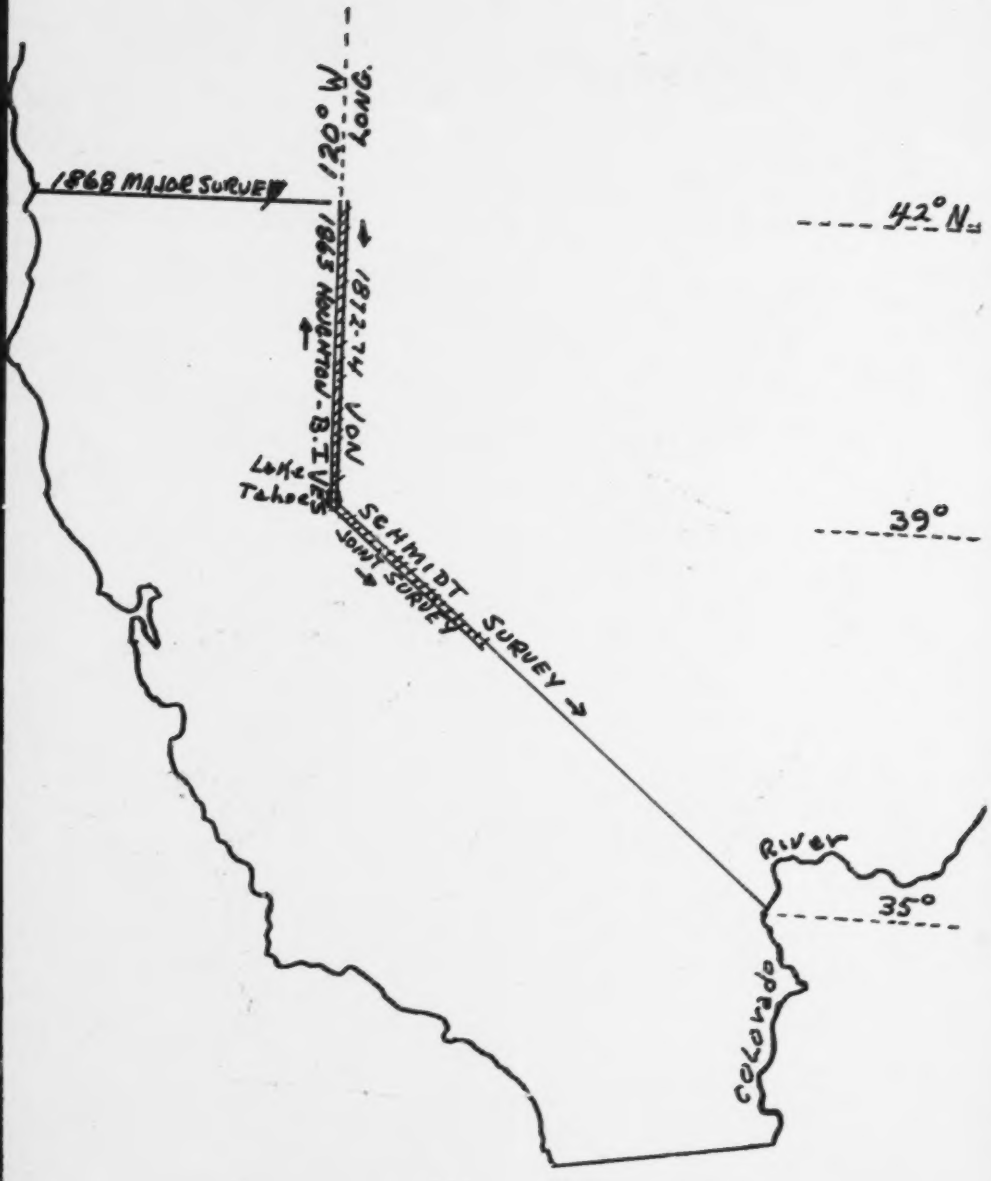

EXHIBIT "E" TO COUNTERCLAIM

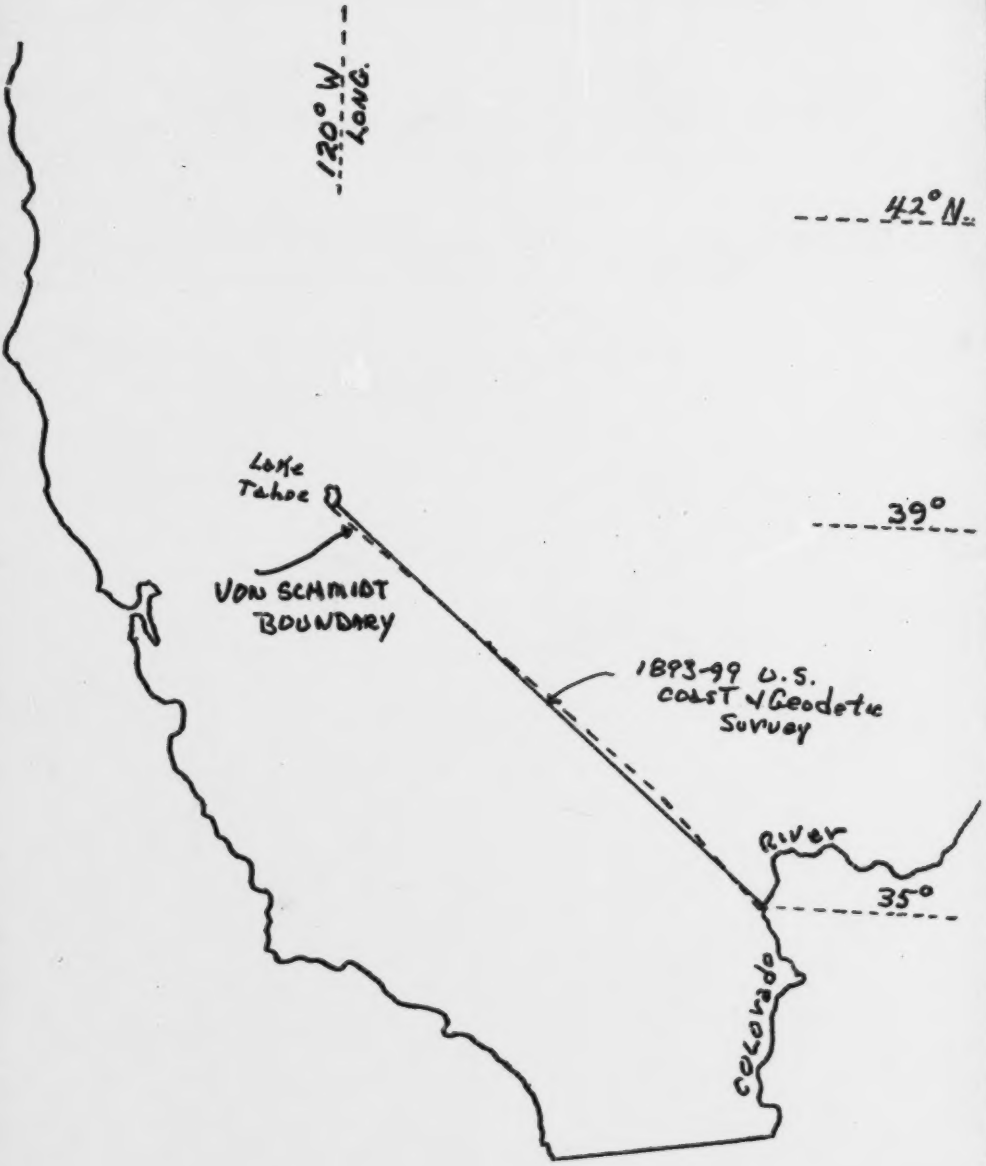

EXHIBIT "F" TO COUNTERCLAIM